

1991

Broadbent Land Co. v. Town of Manila and Daggett County : Amicus Brief

Utah Supreme Court

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Recommended Citation

Legal Brief, *Broadbent Land Co. v. Town of Manila*, No. 910262.00 (Utah Supreme Court, 1991).
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IN THE SUPREME COURT OF THE
STATE OF UTAH

BROADBENT LAND COMPANY,

Plaintiff and
Appellant

vs.

THE TOWN OF MANILA and
DAGGETT COUNTY,

Defendants and
Respondents

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**AMICUS CURIAE BRIEF OF
MOUNTAIN FUEL SUPPLY
COMPANY**

Priority No. 16

No. 91062
CV-324B

Appeal from Ruling of the Eighth Judicial District Court
in and for Daggett County Granting Defendants'
Motion for Summary Judgment.

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LIST OF ALL PARTIES TO THE PROCEEDING

A. **Designation of Plaintiff and Appellant.**

Plaintiff and Appellant is Broadbent Land Company.

B. **Designation of Defendant and Respondent.**

Defendants and Respondents are the Town of Manila, Utah
and Daggett County, State of Utah.

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| TABLE OF AUTHORITIES | ii,iii |
| LIST OF ALL PARTIES TO THE PROCEEDING | 2 |
| JURISDICTION | 3 |
| ISSUES PRESENTED FOR REVIEW | 3 |
| STATEMENT OF THE CASE | 4 |
| SUMMARY OF THE ARGUMENTS | 5 |
| ARGUMENT | 5 |
| POINT I. <u>PICKETT V. CALIFORNIA PACIFIC UTILITIES</u> SHOULD NOT BE REVERSED | 5 |
| A. Application And Development Of The <u>Pickett</u> Standard | 5 |
| B. Benefit To The Servient Estate Supports The <u>Pickett</u> Standard | 7 |
| C. The Standard Is Widely Recognized In Other States | 11 |
| D. The <u>Pickett</u> Standard Is Consistent With Legislative Policy | 13 |
| E. The Impact Of A Change From the <u>Pickett</u> Standard | 16 |
| POINT II. <i>STARE DECISIS</i> REQUIRES THIS COURT TO FOLLOW THE HOLDING OF <u>PICKETT</u> AND TO AFFIRM THE LOWER COURT'S RULING | 17 |
| CONCLUSION | 19 |

TABLE OF AUTHORITIES

| A. CASE LAW | <u>Page</u> |
|---|------------------------------------|
| <u>Amerada Hess Corporation v. Adee</u> , 106 N.M. 422, 744 P.2d 550 (N.M. Ct. App. 1987), <u>cert. denied</u> , 106 N.M. 405, 744 P.2d 180 (1987) | 12,13 |
| <u>Bolinger v. City of Bozeman</u> , 158 Mont. 507, 493 P.2d 1062 (1972) | 8,9 |
| <u>Cater v. Northwestern Tel. Exchange Co.</u> , 60 Minn. 539, 63 N.W. 111 (1895) | 9,10, 11 |
| <u>Cox v. Berry</u> , 431 P.2d 575, 578 (Utah 1967) | 18 |
| <u>Hall v. Lea County Elec. Coop.</u> , 78 N.M. 792, 438 P.2d 632 (1968) | 12,13 |
| <u>Hershfield v. Rocky Mountain Bell Telephone Co.</u> , 12 Mont. 102, 29 P. 883 (1892) | 9 |
| <u>Kipp v. Davis-Daly Copper Co.</u> , 41 Mont. 509, 110 P. 237 (1910) | 8 |
| <u>Minneapolis Gas Co. v. Zimmerman</u> , 253 Minn. 164, 91 N.W.2d 642 (1958) | 11 |
| <u>Northern Transportation Co. of Ohio v. City of Chicago</u> 99 U.S. 635 (1878) | 13 |
| <u>Olsen v. Park Daughters Investment Company</u> , 511 P.2d 145, 147 (Utah 1973) | 18 |
| <u>Pickett v. California Pacific Utilities</u> , 691 P.2d 325 (Utah 1980) | 4,5, 6,7,8,11,13,14,16,17,18,19 |
| <u>Postal Tel. Cable Co. of Utah v. Oregon S.L.R.</u> , 23 Utah 474, 65 P. 735 (1901) | 15 |
| <u>Saunders v. Sharp</u> , 806 P.2d 198 (Utah 1991) | 4 |

| | |
|---|----|
| <u>State ex rel. York v. Board of Commissioners</u> <u>of Walla Walla County</u> | |
| 28 Wash.2d 891, 184 P.2d 577 (1947) | 11 |
| <u>State Road Commission v. Utah Power and Light Company,</u> | |
| 10 Utah 2d 333, 353 P.2d 171 (1960) | 7 |
| <u>State v. Kelback,</u> | |
| 569 P.2d 1100, 1102 (Utah 1977) | 17 |
| <u>White v. Salt Lake City,</u> | |
| 121 Utah 134, 239 P.2d 210 (1952) | 15 |

B. STATUTORY LAW

| | |
|---|----|
| Utah Code Ann. § 17-5-38 (1983) | 13 |
| Utah Code Ann. § 17-5-39(1953) | 13 |
| Utah Code Ann. § 27-12-134 | 14 |
| Utah Code Ann. 1953 Title 27 Chapter 12 | 14 |

JURISDICTION

Mountain Fuel Supply Company ("Mountain Fuel") does not dispute the Court's jurisdiction to hear this appeal.

ISSUES PRESENTED FOR REVIEW

POINT I. Should Pickett v. California Pacific Utilities, 691 P.2d 325 (Utah 1980) be reversed?

Standard of Review: Issue I presents a question of law which is reviewed for correctness. See Saunders v. Sharp, 806 P.2d 198 (Utah 1991).

POINT II. Does the doctrine of *stare decisis* require this Court to follow the holding of Pickett and affirm the lower court's ruling?

Standard of Review: Issue II presents a question of law which is reviewed for correctness. See Saunders v. Sharp, 806 P.2d 198 (Utah 1991).

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Mountain Fuel reasserts and incorporates by this reference the Statement of the Case presented in Broadbent's Brief which has been submitted to this Court. For the sake of brevity, Broadbent's Statement of the Case is not reiterated here.

II. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Mountain Fuel reasserts and incorporates by this reference the Statement of Facts Relevant to the Issues Presented for Review which is contained in Broadbent's Brief which has been submitted to this Court. For the sake of brevity, Broadbent's Statement of Facts is not reiterated here.

SUMMARY OF THE ARGUMENTS

POINT I. THIS COURT SHOULD NOT REVERSE PICKETT V. CALIFORNIA PACIFIC UTILITIES

Pickett v. California Pacific Utilities sets forth the better reasoned and well founded standard regarding the placement of public utility facilities within an easement. Use of an existing easement for installation of new or expanded utilities does not present an encroachment or an additional servitude on the servient estate. Therefore, the use does not require additional compensation to be paid to the adjacent landowner of an existing easement.

POINT II. *STARE DECISIS* REQUIRES THIS COURT TO FOLLOW THE HOLDING OF PICKETT AND TO AFFIRM THE LOWER COURT'S RULING.

The long-established doctrine of *stare decisis* requires this Court to reaffirm Pickett and to allow the continued use of public right-of-ways by public utilities, cities, towns and other governmental entities for transmission of public services to Utah citizens.

ARGUMENT

POINT I.

PICKETT V. CALIFORNIA PACIFIC UTILITIES SHOULD NOT BE REVERSED.

A. Application And Development Of The Pickett Standard:

Appellant, Broadbent Land Company ("Broadbent") filed

this action in the Eighth Judicial District Court in and for Daggett County and unsuccessfully opposed The Town of Manila and Daggett County's (Collectively referred to as "Manila") Motion for Summary Judgment. Manila's Motion for Summary Judgment was premised upon this Court's eleven-year old decision in Pickett v. California Pacific Utilities, 619 P.2d 325 (Utah 1980). In Pickett, an owner of property, over which an easement was granted for use of a public highway, sued California Pacific Utilities for damages claimed from that utility company's placement of power poles and transmission lines along the highway. The landowner argued that the poles and line constituted an additional servitude for which the property owner was due compensation. The trial court disagreed with the property owner and held that the power line did not constitute an additional servitude.

On review, this Court agreed, and held that the power line was within the purview of the easement for highway purposes. Id. at 328. The analysis in Pickett began with a recognition of Utah's public policy regarding the multiple uses of public streets and roadways:

Public welfare demands that the people be served with water, sewer systems, electricity, gas, telephone . . . as well as transportation and means of travel. These services are vital to the well-being of our various communities. It would be almost

impossible to meet these urgent requirements without making use of the public property. The presence of the utility facilities on streets constitutes a use in the public interest subject to public regulation, and an object within the purview of a public policy to be established by the legislature.

Id. at 327 (citing State Road Commission v. Utah Power & Light Company, 10 Utah 2d 333, 353 P.2d 171 (1960) (emphasis added)).

This Court next analyzed the various cases from around the county which had addressed the issue presented in Pickett and then held that the construction of public utility facilities, such as a power line, are consistent uses of a public highway easement and do not constitute an additional burden or servitude. Pickett, 619 P.2d at 327. "To sustain this rule, the principle is applied that uses of a public highway are expansive and are not confined to uses either permitted or contemplated at the time of dedication but are extended to new uses, consistent and proper, as civilization advances." Id.

B. Benefit To The Servient Estate Supports The Pickett Standard:

Pickett v. California Pacific Utilities reaffirms long-standing common law. Moreover, Pickett does not ignore property owners' rights. To the contrary, it allows construction of necessary public utility services which a growing, advancing

civilization demands. The standard in Pickett not only presents an opportunity for the utilities, but also ensures the economic benefit and opportunity for owners of servient estates from the increased capacity and variety of installed utilities.

This advantage to the servient estate owners from new utilities was recognized long before Pickett. The Montana Supreme Court recognized the benefit to landowners in Kipp v. Davis-Daly Copper Co., 41 Mont. 509, 110 P. 237 (1910). Kipp held that even though a highway is created for public use of transportation, it must also be adaptable to the changing needs of society and new modes of transportation. If this does not happen, the rights between the public and the adjacent landowners would require constant readjustment because any change would be considered a new burden not only upon the landowner, but on the highway itself. "For these changing public uses the owner must be presumed to have received compensation when the highway was created." Id. at 240. The Kipp court also held that the disputed use is a public use and was not more burdensome than that which should have been reasonably contemplated when the easement was taken, the use will be in the purview of the easement's limitation. Id.

The Montana Supreme Court reaffirmed Kipp in the case of Bolinger v. City of Bozeman, 158 Mont.507, 493 P.2d 1062 (1972).

There, a landowner sued the City of Bozeman after the City allowed Gallitin County to install a sewer line within a right-of-way of a Gallitin County road. The Bolinger court disagreed with the landowner's argument that the sewer line was improperly placed because the City had no easement which would allow the line. The Montana Supreme Court held that an easement in a county highway is not restricted to only transportation; a public utility system such as a sewer can be installed without the adjacent landowners' approval and did not create an additional servitude for which compensation was necessary. Id. at 1070. See also Hershfield v. Rocky Mountain Bell Telephone Co., 12 Mont. 102, 29 P. 883 (1892) (holding power poles and lines is just and proper and a reasonable and proper use of a public highway right-of-way).

The Bolinger court discussed the vast history of case law which considered whether newly installed public utilities constitute additional burdens or servitudes to adjacent landowners. The Montana Court premised its decision upon the seminal case of Cater v. Northwestern Tel. Exchange Co., 60 Minn. 539, 63 N.W. 111 (1895). There, a dispute arose regarding a telephone line between Minneapolis, Minnesota and St. Cloud, Minnesota along a public highway. The land upon which the highway was constructed was owned by an adjacent landowner

subject to the easement for the highway. Cater held that the telephone line was within the public easement and did not impose an additional servitude upon the landowner's property. Id. at 112. That court set forth a well reasoned analysis and held:

If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. * * * Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. * * * Another proposition, which we believe to be sound, is that the public easement in a highway is not limited to travel or transportation of person or property in movable vehicles. * * * But it is now universally conceded that urban highways may be used for constructing sewers and laying pipes of transmission of gas, water, and the like for public use.

. . . .

Whether it be travel, the transportation of persons and property, or the transmission of intelligence, and whether accomplished by old methods or by new ones, they are all included within the public 'highway easement,' and impose no additional servitude on the land, provided they are not inconsistent with the reasonably safe and practical use of the highway in other and usual and necessary modes, and provided they do not unreasonably impair the special easements of abutting owners in the street for purposes of access, light, and air.

Id. (Emphasis in original).

The Minnesota Supreme Court reaffirmed the Cater decision in Minneapolis Gas Co. v. Zimmerman, 253 Minn. 164, 91 N.W.2d 642 (1958). Zimmerman upheld the long-established and well-reasoned standard and held:

Clearly since the Cater decision in 1895, Minnesota has been definitely committed to the view that the use of rights-of-way by utilities for locating their facilities is one of the proper and primary purposes for which highways are designed even though their principal use is for travel and the transportation of person and property.

Id. at 649 (emphasis in original).

C. The Standard Is Widely Recognized In Other States:

In 1947, the Washington Supreme Court followed the same reasoning which supports Pickett, and held that over-head power lines did not constitute an additional burden to an adjacent landowner in State ex rel. York v. Board of Commissioners of Walla Walla County, 28 Wash.2d 891, 184 P.2d 577 (1947). Despite the landowner's argument, the Washington court held that electric power transmission lines should be considered incidental use of highways and are not "encroachment[s] upon the right of abutting property owners as to afford them a right to compensation for the additional servitude to which their fee interests are subjected." Id. at 585. An additional servitude only arises when the use is

an unreasonable interference with the adjacent landowner's rights. Id. The use would have to amount to an unreasonable non-public use before the circumstances would amount to a taking of the property for which compensation would be necessary. Id. Moreover, the Washington court recognized that "[t]he protection of the public from unreasonable uses of the highways, within the limitations above suggested, is a political question, not a judicial one." Id.

This standard was also recently followed by the New Mexico Court of Appeals when it held that a private gas company could install a pipeline within an easement which adjacent landowners granted to the New Mexico State Highway Department. See Amerada Hess Corporation v. Adeo, 106 N.M. 422, 744 P.2d 550 (N.M. Ct. App. 1987), cert. denied, 106 N.M. 405, 744 P.2d 180 (1987). In that case, the landowners argued that even though the New Mexico State Highway Commission had authority to issue a permit for the pipeline and to allow the pipeline to be placed under a public highway, the commission did not have the authority to grant the use to a non-public utility. The New Mexico Court of Appeals disagreed.

In [Hall v. Lea County Elec. Coop. 78 N.M. 792, 438 P.2d 632 (1968)] our supreme court held:

We are of the opinion that the better reasoning supports the

general rule that the construction and maintenance of an electric power or transmission line, within the boundaries of a public highway, are consistent with the permissible uses to be made of a public highway easement and do not constitute an additional burden or servitude.

Amerada Hess, 744 P.2d at 552 (quoting Hall, 438 P.2d at 795).

The United States Supreme Court has even held that "[a]cts done in the proper exercise of governmental powers and not directly encroaching upon private property, although their consequences may impair its use, do not entitle the owner of such property to compensation from the State or its agents nor give him any right of action." Northern Transportation Co. of Ohio v. City of Chicago, 99 U.S. 635 (1878).

D. The Pickett Standard Is Consistent With Legislative Policy:

Utah statute allows counties to purchase or otherwise acquire rights-of-way for county roads. Utah Code Ann. § 17-5-38 (1983). The statutes also authorize counties to "grant franchises along and over the public roads and highways for all lawful purposes, upon all such terms, conditions and restrictions as in the judgment of the board may be necessary and proper. . . ." Utah Code Ann. § 17-5-39 (1953). These statutes allow Daggett County to grant the easement to the Town of Manila to install and maintain that city's sewer line.

The legislative policy consistent with Pickett is also evident in other parts of the Utah Code. For instance, Utah Code Annotated section 27-12-134 specifically authorizes the State and its counties and cities to:

adopt regulations . . . for the . . . placement, construction, and maintenance of approach roads, driveways, structures, poles, pipelines, conduits, sewers, ditches, culverts, facilities, or any other structures or objects of any kind or character on the public highway rights-of-way under their respective jurisdiction.

Utah Code Ann. § 27-12-134 (1963). This documents the expectation that utilities will be installed from time to time on public right-of-ways, which is part of the expectation when the easement is first acquired. The expectation even shows up as a separate chapter of the Utah Administrative Code which governs "Accommodations of Utilities on Federal-Aid and Non-Federal-Aid Highway Rights of Way." R.917-4. The public policy is explicit in the regulation:

It shall be the policy of the Utah Department of Transportation in accordance with the Utah Code Annotated 1953, Title 27, Chapter 12, to accommodate utility installations on federal-aid and non federal-aid highway rights-of-way, to the extent that such installations may be accommodated without compromising the safety or integrity of the highway facility and without interference with the normal operation and maintenance

activities as required for the facility.

R.917-4-2

Utah's public welfare demands that the citizens of this state be provided with water, power, sewage systems in addition to means of travel and transportation. These services could not be realistically provided without using public property. This Court has recognized that any public easement within Utah implicitly includes necessary uses which arise from the demands of public welfare which are spawned from the ever changing needs of modern day civilization. These needs are recognized when the easement is granted and for which the grantor is normally compensated.

Utah has followed suit and held that utilities are not obligated to pay landowners for the location and maintenance of public utility facilities upon public right-of-ways. See e.g., White v. Salt Lake City, 121 Utah 134, 239 P.2d 210 (1952); Postal Tel. Cable Co. of Utah v. Oregon S.L.R. Co., 23 Utah 474, 65 P. 735 (1901). Mountain Fuel, and undoubtedly other public utility companies, have relied heavily on this long-standing line of cases in setting rates and making decisions regarding the location of certain utility facilities. A change from this standard would result in a substantial burden not only on public

utilities, such as Mountain Fuel, but also on its rate payers and indeed, all of Utah's citizens.

E. The Impact Of A Change From the Pickett Standard:

A rule which would not allow for the reasonable contemplation of these uses would trigger an unending and constant requirement of readjustment to the rights and privileges which exist between the public users and utilities and landowners. This constant readjustment has never been approved either judicially or statutorily. Public utilities, as well as consumers, would eventually shoulder an extreme financial burden if required to compensate all abutting landowners each time a new gas pipeline was laid and maintained in a public right-of-way.

The magnitude of the problem is demonstrated by the extensive network of utility facilities in modern society. Based on the annual report which Mountain Fuel is required to file with the Office of Pipeline Safety of the U.S. Department of Transportation, in 1990 Mountain Fuel operated 5,832 miles of service lines and 8,549 miles of main lines. This represents a total milage of 14,381 miles of underground gas pipeline in Utah. Approximately Eighty percent (80%) of this underground pipeline (11,505 miles) is located in public right-of-ways.

Public utility facilities, including but not limited to overhead transmission lines and underground gas and water/sewer pipelines are reasonable uses of the easements. They hinder neither the dominant nor servient estate owners' access, light or air. The facilities are only customary incidental uses of the highways; they cause no permanent disruption or destruction of the easement or the adjacent land. To the contrary, they provide essential services which are necessitated by such factors as increases in population and technological advancements which will inevitably benefit the adjacent landowner or servient estate. Because the uses do not constitute an encroachment or an additional servitude, the Pickett court correctly ruled that adjacent landowners are not entitled to additional compensation when such facilities are installed within an existing easement.

II. *STARE DECISIS* REQUIRES THIS COURT TO FOLLOW THE HOLDING OF PICKETT AND TO AFFIRM THE LOWER COURT'S RULING.

The doctrine of *stare decisis* is grounded on the principle that established and accepted precedent should be followed in order to provide a reliable base of law on which to build a stable society. The Utah Supreme Court has recognized this rule on various occasions. In State v. Kelback, this Court stated that "[a]s a general proposition the law as established should remain so until changed by the legislature, whose prerogative it

is to make and to change the law." 569 P.2d 1100, 1102 (Utah 1977). The proper use of *stare decisis* requires that it be used to serve the interests of justice. Cox v. Berry, 431 P.2d 575, 578 (Utah 1967).

This Court has recognized that one of the primary principles concerning ownership of land "is that the peace and good order of society require that there be stability not only in record land titles, but more importantly, in the ownership and occupation of lands." Olsen v. Park Daughters Investment Company, 511 P.2d 145, 147 (Utah 1973) (emphasis added). Therefore, *stare decisis* requires that this Court follow the precedent it established in Pickett and affirm the lower court's ruling which allows the use of the easement for the sewer line.

The easement acquired by Daggett County, a portion of which was utilized by the Town of Manila, Utah, "includes every reasonable means for the transmission of intelligence, the conveyance of persons, and the transportation of commodities, which the advance of civilization may render suitable for a highway." Pickett, 619 P.2d at 325. This necessarily includes the use of public easements by public utilities, cities, counties and other governmental entities as a means to provide the citizens of this state with necessary services. The sewer line involved in this case is within the public easement, for the

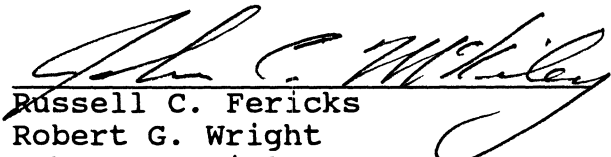
benefit of the public, and included within the type of use set forth in the holding of Pickett.

CONCLUSION

Pickett should not be overruled. That decision's holding and reasoning is consistent with long-standing statutory and decisional law. Moreover, the ruling has been relied upon by Mountain Fuel and other public utilities in establishing their operations. Any deviations from Pickett will be detrimental to Utah and its citizens. Therefore, Mountain Fuel respectfully requests this Court to affirm the lower court's ruling and not reverse Pickett v. California Pacific Utilities.

DATED this 24th day of October, 1991.

RICHARDS, BRANDT, MILLER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four (4) true and correct copies of the foregoing instrument were mailed, first class, postage prepaid, on this 24th day of October, 1991, to the following counsel of record:

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